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# The Impact of *Obergefell*: Traditional Marriage's New Lease on Life?

David Pimentel\*

## ABSTRACT

*The Supreme Court's decision in Obergefell v. Hodges in June 2015 provided a dramatic turn in America's ongoing debate over same-sex marriage. Justice Kennedy's opinion speaks in emotionally evocative terms about the compelling societal and personal significance of marriage, holding that the right to marry is a fundamental right under the Fourteenth Amendment, a right that extends to same-sex couples. Justice Kennedy's rhetoric about the importance of marriage is noteworthy, even curious, given marriage's steady decline over the past 50 years. Just when it seemed that marriage was losing its significance in our society—because marriages are more easily ended, because alternatives to marriage have been created, and because fewer and fewer couples are choosing to formalize their relationships with marriage in the first place.*

*But Justice Kennedy's opinion strongly reinforces the idea that marriage remains relevant today, that it is something to be encouraged, revered, and protected. The proliferation of alternatives to marriage in recent years—e.g. civil unions, domestic partnerships and designated beneficiaries—has certainly contributed to the ongoing erosion of marriage as a meaningful legal institution, but because these options were created mostly to accommodate same-sex couples, who now have full access to marriage, one might argue that they are no longer needed. Clarity in the law will benefit from a return to bright-line rules, where nothing less than marriage itself qualifies individuals to enjoy and claim (1) legal status as a couple, gay or straight, and (2) the benefits that come with such recognition. At the same time, this would better serve the state's stated interest in promoting the security and stability of family relationships. Defenders of traditional marriage, or, those who believe that marriage is or should be meaningful, should seize the opening that Justice Kennedy's opinion has given them, and breathe new life into*

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\* Associate Professor of Law, University of Idaho. This paper was prepared for a Symposium on "The Implications of *Obergefell v. Hodges* for Families, Faith and the Future," held at Brigham Young University's J. Reuben Clark Law School, on Oct. 12, 2015. Special thanks to Professor Lynn Wardle for the gracious invitation to prepare and present this paper, and to Emily Joyce for research assistance. The views expressed are exclusively those of the author.

*the institution of marriage by lobbying to eliminate its alternatives. In this sense, the Obergefell decision may not signal traditional marriage's demise as much as its rebirth, in an incarnation that is at once more inclusive and more robust.*

## I. INTRODUCTION

The Supreme Court's decision in *Obergefell v. Hodges* in June 2015 provided a dramatic turn in America's ongoing debate over same-sex marriage. Justice Kennedy's opinion speaks in emotionally evocative terms about the compelling societal and personal significance of marriage, holding that the right to marry is a fundamental right under the Fourteenth Amendment, a right that extends to same-sex couples. Justice Kennedy's rhetoric about the importance of marriage is noteworthy, even curious, given marriage's steady decline over the past 50 years. But for reasons set forth in this article, the *Obergefell* decision may signal a resurgence of marriage in our society, particularly if states are persuaded to stop recognizing alternatives to marriage, such as domestic partnerships, now that same-sex couples have full access to marriage.

This article starts, in Section I, with the distinction between the religious significance of marriage and the legal significance of marriage. While the former may have provided the primary motivation for those opposed to same-sex marriage,<sup>1</sup> the religious agenda could not justify these laws in the face of constitutional challenge. The justification for these laws, as argued before the courts, rather, flows from the state's legitimate interest in promoting stability and security in relationships, which, in turn, benefits any children who might be born to the couple.<sup>2</sup>

Section II documents the decline of marriage in America over the past 50 years, which makes Justice Kennedy's soaring paean to marriage all the more surprising. Of great significance, among the many social and legal developments hostile to marriage, is the creation of alternatives to marriage, such as domestic partnerships, which have undermined marriage by giving couples options for defining their relationship in alternative terms. This development, prompted in large

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1. See, e.g., Catherine Harmon, *Bishops across the country weigh in on SCOTUS ruling*, CATHOLIC WORLD REPORT (June 26, 2015), [http://www.catholicworldreport.com/Blog/3985/bishops\\_across\\_the\\_country\\_weigh\\_in\\_on\\_scotus\\_ruling\\_updated.aspx](http://www.catholicworldreport.com/Blog/3985/bishops_across_the_country_weigh_in_on_scotus_ruling_updated.aspx).

2. And since children were not the natural by-product of a same-sex union, there was no reason to extend the benefits of marriage to same-sex couples.

part by the need to accommodate same-sex couples for whom marriage had not been an option, is addressed in Section III.

Section IV explores the potential impact of the *Obergefell* decision, the endorsement of marriage as a concept with continuing vitality and significance. It also suggests that the legal alternatives to marriage that have sprung up in recent years may be entirely unnecessary, now that same-sex couples have full access to marriage. Indeed the public policy behind marriage laws, argued before the courts in the same-sex marriage cases, would be *better* served if civil unions, domestic partnerships, and other alternatives to marriage ceased to be options, and marriage made a comeback as the sole option for couples seeking state recognition. This development, shutting down the alternatives in the wake of *Obergefell*, could give marriage a new lease on life.

Of course, this public policy objective—to promote stability and security in family units by encouraging couples to marry—is not universally shared. Section V discusses another vision for the future of the family, one that urges the demise of marriage as an overly confining construct, rooted in obsolete definitions of what constitutes a family. Some voices are advocating for policies that are far more inclusive, allowing couples to define their relationships however they wish, and extending the recognition and benefits traditionally reserved for married couples to all couples.

Section VI suggests a strategy for defenders of traditional marriage to seize the opportunity that *Obergefell* has given them. In particular, they may wish to advocate for a return to a choice between “marriage or nothing” and pursue legislation to repeal state recognition for any and all of marriage’s lesser alternatives.

## II. MARRIAGE AS A SOCIAL/RELIGIOUS INSTITUTION V. MARRIAGE AS A LEGAL INSTITUTION

The recent debate over same-sex marriage has evoked strong feelings over fundamental values in our society. On the one hand, social and religious conservatives have claimed marriage as a sacred institution, central to the moral fabric of our society. Accordingly, any attempt, by a secular court no less, to redefine marriage to include same-sex unions is an affront to their faith. On the other hand, more progressive voices suggest that the exclusion of same-sex couples from this institution offends our values of equality and dignity for all

individuals. From this perspective, perpetuation of an inherently discriminatory institution, under the authority of the state no less, is enforced bigotry and a moral outrage.

The problem arises in the context of *legal* recognition of marriage, the fact that the state accords certain legal rights and benefits to married couples that have been traditionally denied to couples who, for whatever reason, have not entered into a legally cognizable marriage.<sup>3</sup> Because the state gives special status to married couples, the question necessarily arises over who should have access to that status. There are many reasons a couple may not be permitted to marry, including the fact that one or both are minors, that the couple is too closely related by blood, or that one or both are still married to someone else, just to name a few. These exclusions from marriage have not generated as much widespread controversy as the exclusion of same-sex couples, perhaps because the justifications for such rules seem to meet with general approval or acquiescence across the socio-religious and political spectrum.<sup>4</sup> That is, there are compelling secular reasons to limit marriage in those ways, so the state's rules and restrictions governing marriage can be justified in those terms.<sup>5</sup>

### *A. The Religious Significance of Marriage*

The culture war over same-sex marriage, in contrast, has been sharply divided in ideological, or more precisely, religious terms. If marriage is, at its core, a divine sanctioning of sexual relations and of family units, then the state lacks authority to redefine it.<sup>6</sup> To the

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3. State governmental rights, benefits, and responsibilities that accompany marriage include the following: "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support and visitation rules," as well as myriad provisions under federal law. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

4. That is not to say that there has been no controversy. Polygamist groups have asserted religious rights to marry, despite the fact that they are already married. *E.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879).

5. Minority is an uncontroversial restriction, as under contract law, minors are generally understood to lack the capacity to make legally binding covenants, and the same rationale certainly applies to marriage covenants. Given their inherent vulnerability in an adult-controlled world, minors may also need to be protected from undue influence of adults pressuring them to make such legal commitments. Prohibitions on marrying close relatives have been justified on a variety of grounds, including the biological evils of inbreeding. Additionally, anti-bigamy laws protect spouses who are unaware and nonconsenting.

6. The Church of Jesus Christ of Latter-day Saints, *Response to the Supreme Court Deci-*

faithful, these values are so deeply held,<sup>7</sup> and of such compelling importance, that the licensing of same-sex unions prompts not just outrage and protest, but defiant acts of civil disobedience.<sup>8</sup>

Indeed, legal recognition of same-sex marriage conveys a message to the larger community, particularly to children growing up in the public schools, that such relationships are legitimate and acceptable. Religious conservatives understandably find the message abhorrent, and are compelled to resist it. To acquiesce in this abomination, in their view, is to “call good evil, and evil good,”<sup>9</sup> inviting the wrath of God and a destruction of Biblical proportions.<sup>10</sup>

Moreover, to the extent marriage is considered a sacrament of the church,<sup>11</sup> the faithful may view same-sex couples’ claim to marriage as a defilement of something sacred. Little wonder religious institutions were the primary advocates of California’s Proposition 8 and of other

*sion Legalizing Same-Sex Marriage in the United States*, MORMON NEWSROOM, (June 29, 2015), <http://www.mormonnewsroom.org/article/top-church-leaders-counsel-members-after-supreme-court-same-sex-marriage-decision> (“Changes in the civil law do not, indeed cannot, change the moral law that God has established. God expects us to uphold and keep His commandments regardless of divergent opinions or trends in society.”).

7. Karen Hughes & Mark Penn, *What Are American Values These Days?*, TIME (July 4, 2012), <http://ideas.time.com/2012/07/04/what-are-american-values-these-days-2/> (“Eighty-nine percent—almost nine in ten Americans—answered yes when asked the straightforward question: Do you believe in God? . . . And the core beliefs shared by God-fearing people of many different faiths spring from that”).

8. A few instances of public protest have been chronicled in the press, including the story of County Clerk Kim Davis, who insisted that the issuance of marriage licenses to same-sex couples would violate her religious beliefs. See Alan Blinder & Richard Fausset, *Kentucky Clerk Who Said ‘No’ to Gay Couples Won’t Be Alone in Court*, N.Y. TIMES (Sept. 2, 2015), [http://www.nytimes.com/2015/09/03/us/kentucky-rowan-county-clerk-kim-davis-denies-marriage-license.html?\\_r=0](http://www.nytimes.com/2015/09/03/us/kentucky-rowan-county-clerk-kim-davis-denies-marriage-license.html?_r=0) (discussing how those resisting same-sex marriage, even post-*Obergefell*, find support from religiously-affiliated legal “ministry”). Also, a judge in Tennessee refused to grant a straight couple a divorce, claiming that the Supreme Court’s decision in *Obergefell* deprived the state courts of jurisdiction to determine when a marriage begins, and by implication, when it ends. Michael E. Miller, *Tenn. Judge Refuses to Grant Straight Couple a Divorce Because . . . Gay Marriage*, WASH. POST (Sept 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/04/tenn-judge-refuses-to-grant-straight-couple-a-divorce-because-of-gay-marriage/>.

9. *Isaiah* 5:20, 24 (King James) (“Woe unto them that call evil good, and good evil; . . . as the fire devoureth the stubble, and the flame consumeth the chaff, so their root shall be as rottenness, and their blossom shall go up as dust: because they have cast away the law of the Lord of hosts, and despised the word of the Holy One of Israel.”).

10. *Id.* Biblical accounts of the destruction of the city of Sodom, and of the fall of Jerusalem to the Babylonians, attribute those events to the wrath of God, brought on by the wickedness of the people. See *Genesis* 18:20–33, 19:1–29. It is also common to associate the sins of the city of Sodom, prompting its destruction, more specifically with gay sex, reflected in the word “sodomy.” JONATHAN GOLDBERG, *RECLAIMING SODOM* 47 (1994).

11. See, e.g., *The Sacrament of Matrimony*, THE CATECHISM OF THE CATHOLIC CHURCH, Article VII.

efforts to block legal recognition of same-sex marriage.<sup>12</sup> To the faithful, official recognition of same-sex marriage was at the very least a corruption of the values they hold most dear, and at worst an omen of apocalyptic retribution.

As long as these values flow from and are defined by religious dogma, however, they cannot form the foundation for public policy in a secular society. Promoting the beliefs and accommodating the sensibilities of a religious minority, or even a religious majority, is not a legitimate function of government.<sup>13</sup> If that is what the preservation of traditional marriage is about, it violates the Establishment Clause of the First Amendment and cannot withstand constitutional scrutiny.<sup>14</sup>

### *B. The Secular Significance of Marriage*

Accordingly, those defending traditional marriage in the legal arena (*i.e.* defending lawsuits from same-sex couples seeking access to marriage) faced the challenge of formulating and articulating a legitimate public policy rationale for limiting marriage to opposite-sex couples. It was no doubt a daunting task, given that the voters who had adopted these same-sex marriage bans left no legislative history as to what motivated their votes.<sup>15</sup> As already noted, religious values

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12. Surina Khan, *Tying the Not: How the Right Succeeded in Passing Proposition 8*, PUB. EYE MAG., Spring 2009 at 3, 3-4, available at [http://www.publiceye.org/magazine/v23n4/proposition\\_8.html](http://www.publiceye.org/magazine/v23n4/proposition_8.html). ("The weaving together of the campaign involved a broad network of support and funding that included prominent Christian Right organizations including Focus on the Family, Concerned Women for America, and the Family Research Council. The campaign raised more than \$40 million from conservative supporters across the country. Much of the funding came from prominent donors like the Utah-based Church of Jesus Christ of Latter-day Saints and the Roman Catholic conservative group, Knights of Columbus."). The voting on Proposition 8 was closely correlated with the religiosity of the individual voters: "The 2008 exit polls found that frequency of religious attendance was strongly correlated with voting on Proposition 8. More than 4-in-5 Californians who attend religious services weekly or more supported Proposition 8. On the other end of the spectrum, less than 1-in-5 (17%) of those who never attend supported the measure." Robert P. Jones & Daniel Cox, *California's Proposition 8 and Religious Voters*, PUB. RELIGION RES., available at <http://publicreligion.org/site/wp-content/uploads/2011/06/Religious-Voters-and-Proposition-8-Memo.pdf> (last visited March 30, 2015).

13. See *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (The prayer offered in public schools "must be struck down as a violation of the Establishment Clause because [it] . . . was . . . part of a governmental program to further religious beliefs."); see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

14. *Abington*, 374 U.S. at 294-95 (1963) ("[W]hat our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which . . . employ the organs of government for essentially religious purposes.").

15. More than 30 states adopted constitutional amendments banning same-sex marriage after popular votes on the issue. *Same-Sex Marriage Fast Facts*, CNN (Sept. 26, 2015), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/>.

were a likely motivation for many voters, and states could hardly cite that; rather they were left to construct their own arguments for why the voter-approved measures should survive constitutional challenge.<sup>16</sup> Of course, to the extent such arguments may have been contrived by defenders of traditional marriage to rationalize a religious agenda, or were perceived that way, they were viewed with suspicion by the courts.<sup>17</sup>

Concepts of “morality” that transcend any particular religious tradition, once used to uphold anti-sodomy laws,<sup>18</sup> no longer enjoy wide enough acceptance outside of religious communities to permit their assertion as legitimate, secular priorities for public policy.<sup>19</sup> After *Lawrence v. Texas*,<sup>20</sup> it appears that public morals can be enforced by law only if they can be justified from a secular perspective, such as a concern to protect the rights of victims.<sup>21</sup>

### C. The States’ policy-based argument in favor of marriage

Of course, marriage is not a purely religious concept. The importance of marriage—however defined—in society retains considerable resonance even outside of the religious sphere.<sup>22</sup> Commitment

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16. It is worth noting that in California, the attorney general declined to defend the voter-passed measure (Proposition 8) when it was challenged in court. Valerie Richardson, *California’s Jerry Brown Won’t Defend Prop 8*, WASH. TIMES (Sept. 3, 2010), <http://www.washingtontimes.com/blog/inside-politics/2010/sep/3/californias-jerry-brown-wont-defend-prop-8/>; David G. Savage, *Prop. 8: Supreme Court Clears Way for Gay Marriage in California*, L.A. TIMES (June 6, 2013), <http://articles.latimes.com/2013/jun/26/news/la-pn-prop-8-supreme-court-ruling-20130626> (“Usually, the governor and state’s lawyers defend state laws in federal court, but both Gov. Jerry Brown and Atty. Gen. Kamala Harris refused to defend Prop. 8.”).

17. See, e.g., discussion of Judge Posner’s opinion in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *infra* Section II D.

18. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (“To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”). These general concepts of morality were used, curiously enough, to uphold anti-bigamy laws as well. See *Reynolds v. United States*, 98 U.S. 145 (1878) (dismissing the Free-Exercise clause claims of a Mormon polygamist, suggesting that a ruling for Reynolds might prompt others to claim a religious right to practice human sacrifice).

19. *Lawrence v. Texas*, 539 U.S. 558 (2003) (explicitly rejecting the invocation of “Judeo-Christian moral and ethical standards” in Chief Justice Burger’s *Hardwick* concurrence).

20. *Id.*

21. Daniel Piar confirms this general understanding of the impact of *Lawrence*, even as he argues against it. Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139 (2012).

22. *Cosmopolitan* magazine ran a feature listing seven benefits of marriage, none of which invoke religious considerations. The first reason identified is “Making it official gives our relationship more substance,” and is explained as follows: “Publicly declaring your love in front of



and stability in relationships is widely regarded as healthy, particularly for children.<sup>23</sup> Compelling evidence shows that children in single-parent households suffer in a variety of ways, both emotional and material; any institution that promotes commitment and stability in the relationship between the parent/caregivers will benefit their children.<sup>24</sup>

The “marriage benefit” to children goes beyond that of having two caregivers in the home. Cohabitation creates a two-parent family, which certainly benefits the kids, but cohabitation cannot replicate the positive outcomes children get from growing up in a home with married parents.<sup>25</sup> It appears that because cohabiting couples are more likely to separate, children in those households grow up with different attitudes about permanence and stability, and may not feel as secure in their family situation.<sup>26</sup> They are less likely to make long-term commitments themselves as they mature,<sup>27</sup> and suffer other harms to their physical and mental health.<sup>28</sup> In contrast, kids who grow up in married households will, on average, benefit from the security of knowing that there is some degree of permanence—encouraged and supported by marriage vows—in their family environment.<sup>29</sup>

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friends and family in a formal ceremony, and then signing a marriage license that legally seals the deal can make your twosome feel meaningful in a way that simply living together long-term might not.” So . . . *Why Do People Get Married, Anyway?*, COSMOPOLITAN (Dec. 4, 2012), <http://www.cosmopolitan.com/sex-love/advice/g2514/why-do-people-get-married/?slide=1>. The other six reasons include some practical considerations, but also additional factors suggesting there is inherent meaning and resonance to marriage, quite aside from any religious significance: (2) “You’re more likely to stick out tough times,” (3) “You’ll feel (and act) like a team,” (4) “You’ll become more relaxed and grounded,” (5) “It shows how important your partner is,” (6) “There are practical [*i.e.* legal] benefits too,” and (7) “You’ll do it more if you say ‘I do.’” *Id.*

23. W. BRADFORD WILCOX ET AL., *WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* 12–18, 23 INST. FOR AM. VALUES (2d ed. 2005); see also Wendy D. Manning, Pamela J. Smock, & Debarum Majumdar, *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RES. & POL’Y REV. 135 (2004).

24. Manning, *supra* note 23; SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1996). McLanahan and Sandefur, using sophisticated statistical analysis, demonstrate that children raised by only one biological parent are worse off, on average, than children who grow up in households with both biological parents, and establish this effect regardless of the race or education of the parents. *Id.*

25. WILCOX, *supra* note 23, at 12–13.

26. *Id.*

27. *Id.* at 14.

28. *Id.*

29. *Id.* at 15. The benefits are not just limited to the children. There is evidence that the commitment associated with marriage promotes high-quality relationships not solely between parents and children, but between the adults as a married couple as well. *Id.*

It follows, therefore, that the state has a legitimate interest in promoting family stability—for the benefit of children, primarily—by encouraging marriage. And the state encourages marriage by giving legal recognition to married couples, and by affording them certain benefits unavailable to couples who choose not to make a marriage commitment.<sup>30</sup>

*D. The state's argument for limiting marriage to opposite-sex couples*

In the cases leading up to *Obergefell*, the opponents of same-sex marriage—again, mostly state attorneys general—pointed to this impact on children as a reason to uphold marriage definitions limited to opposite-sex couples. The idea was that *only* opposite-sex couples had, as a direct consequence of their union, the potential to become parents, so the state's legitimate interest in promoting marriage (granting various legal advantages to married couples) applied only to opposite-sex couples. These arguments ultimately rang a little hollow—and even came across as disingenuous—given the fact that same-sex couples choose to be parents too, and that opposite-sex couples who do not have children, due to personal choice or physical disability, were still entitled to the benefits of marriage.<sup>31</sup> State lawyers were reduced to arguing that because only opposite-sex couples could become parents by accident, and because incentives to marry encouraged stability in those relationships (which would, in turn, benefit the unplanned offspring of those couples), there was a legitimate state interest in limiting the benefits of marriage to opposite-sex couples.<sup>32</sup>

No one was fooled. The courts perceived that true motivation for barring legal recognition was an attempt to legislate religious values,<sup>33</sup> and to cultivate a society that enforces those values generally. A

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30. These benefits have, however, become increasingly available to non-married couples in recent years. See discussion *infra* Section IV. ALTERNATIVES TO MARRIAGE—BLURRING THE BRIGHT LINE.

31. The fact that opposite-sex couples may choose, through the use of contraception, not to have children was largely irrelevant to this argument, because the state was interested in addressing those who *accidentally* become parents, as explained *infra*.

32. Zack Ford, *Seventh Circuit Unanimously Rejects Indiana and Wisconsin's Same-Sex Marriage Bans*, THINK PROGRESS (Sept. 4, 2014), <http://thinkprogress.org/lgbt/2014/09/04/3479064/seventh-circuit-indiana-wisconsin-marriage/> (“[Indiana] claims that ‘straight couples tend to be sexually irresponsible’ and so must be pressured to marry for the children they accidentally have.”).

33. That is as charitably as the point can be put. One could certainly argue that the true

great example is the argument in *Baskin v. Bogan*, from the Seventh Circuit in 2014.<sup>34</sup> Judge Richard Posner pushed back hard on the state attorneys general in oral arguments.<sup>35</sup> His opinion for the panel did little to conceal his contempt for the states' position:

Indiana's government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.<sup>36</sup>

If marriage created a more stable and secure environment for children to grow up in, and society therefore has a legitimate interest in promoting marriage, there seemed to be an equally compelling reason for society to promote the stability of two-mom or two-dad families.<sup>37</sup> There is evidence that a significant number of children are being raised by same-sex couples, both married and unmarried.<sup>38</sup> If the state has an interest in promoting stability through marriage for the sake of the children, then prohibiting marriage to thousands of same-sex families with children would be against that state interest.<sup>39</sup>

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motivation was prejudice or homophobic bigotry.

34. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

35. David Lat, *Judge Posner's Blistering Benchslaps At The Same-Sex Marriage Arguments*, ABOVE THE LAW (Aug. 27, 2014, 11:09 AM), <http://abovethelaw.com/2014/08/judge-posners-blistering-benchslaps-at-the-same-sex-marriage-arguments/> ("Chris Geidner of BuzzFeed, a leading chronicler of marriage-equality litigation, described the proceedings as 'the most lopsided arguments over marriage bans at a federal appeals court this year.' Ian Millhiser of ThinkProgress called it 'a bloodbath.' That's no exaggeration. . . . At various points, Judge Posner derided arguments from the Wisconsin and Indiana lawyers as 'pathetic,' 'ridiculous,' and 'absurd.'").

36. *Baskin*, 766 F.3d at 662. The Supreme Court briefly discussed this same concept, though with less outright disagreement. See Transcript of Oral Argument at 55–57, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (Nos. 14–556, 14–562, 14–571, 14–574).

37. There is scholarship to suggest that children will not do as well in two-mom or two-dad families, see generally WHAT'S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? (Lynn D. Wardle, ed., 2008), although there is little evidence on the experience of *married* moms or *married* dads, since until recently these same-sex couples were not permitted to marry.

38. Brief for Gary J. Gates as Amicus Curiae Supporting Petitioners at 10–14, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574).

39. *Id.*

The upshot of all of this is that the reasons to resist legal recognition of same-sex marriage are largely rooted in religious faith and religious principle. A large portion of Americans opposed same-sex marriage<sup>40</sup>—and until a few years ago, a significant majority.<sup>41</sup> But in a game that doesn't allow you to play the religion card, the argument against *legal* recognition of same-sex marriage is very weak indeed.<sup>42</sup>

### III. DECLINE OF MARRIAGE

As already noted, the legal significance of marriage has been on a steady decline over the last fifty years. The trend has been evident in a variety of disparate legal developments discussed below, but it has been steady and consistent across the board.<sup>43</sup> The decline is also reflected in terms of participation, as Americans are postponing marriage, or declining to marry at all.<sup>44</sup> Until *Obergefell*, there was little reason to believe that marriage would or could make a comeback.

#### A. No-Fault Divorce

The stability and permanence of the marriage relationship were dealt a heavy blow when no-fault divorce became the norm,<sup>45</sup> opening the doors to unilateral marriage dissolution.<sup>46</sup> Making it easy to

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40. Bill Chappell, *60 Percent: Record Number Of Americans Support Same-Sex Marriage In Poll*, NPR (May 19, 2015) (“Hitting a new all-time high, 60 percent of Americans say they believe marriage between same-sex couples should be recognized by law, with the same rights and privileges as traditional marriages, according to the latest Gallup poll. That’s a far cry from 1996, the first year in which Gallup posed the question to Americans. Back then, 68 percent of respondents said same-sex marriages should not be valid, compared to 27 percent who were in favor of gay marriage.”).

41. *Id.* (“Gallup says, ‘Public support for the legality of same-sex marriage first reached a majority in 2011, when 53 percent supported it.’”).

42. This is not to say that *Obergefell* was an easy case, or that its outcome was a foregone conclusion. In order to prevail, the plaintiffs had to show not only the lack of a compelling policy basis for limiting marriage to opposite-sex couples, but that this rendered such limits unconstitutional. Chief Justice Roberts’ dissent all but conceded the policy argument, but insisted that unconstitutionality had not been shown: “Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

43. See discussion *infra* at Sections III.A-D.

44. See discussion *infra* at Section III.E.

45. Ted Gest, *Divorce; How the Game Is Played Now*, U.S. NEWS & WORLD REPORT, Nov. 21, 1983 at 39.

46. This is not to suggest that no-fault divorce is necessarily bad policy. In the forty-five years since California adopted the first no-fault divorce law, its merits have been hotly debated, with compelling arguments on both sides. See Lauren Guidice, *New York and Divorce: Finding*

escape from a marriage certainly undermined the enduring nature of marital commitments. At the same time, no-fault divorce undermined the power of marriage to ensure material support for children, as a pattern emerged in which divorcing mothers negotiated for custody, and gave up claims to spousal and child support in return.<sup>47</sup>

### *B. The Demise of Marriage-Related Criminal and Tort Doctrines*

Other legal doctrines that were designed to shore up stability and commitment in marriage have faded away almost completely, including criminal liability for adultery and heart-balm tort liability.<sup>48</sup> For the most part, philanderers are now free to philander without fear of legal consequences, as consensual sexual conduct is considered to be a purely private matter beyond the reach of the state.<sup>49</sup> This demonstrates a decline in society's view that marriage is a worthwhile institution that should be protected. Instead, with the abandonment of such remedies for interference with marriage, the hallmark of marriage as the societal ideal began to fall. Those who were married could easily get out of marriage, and those who interfered with marriage were free to do so, with no legal consequence.

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*Fault in a No Fault System*, 19 J.L. & POL'Y 787 (2010–11). But whatever the benefits of no-fault divorce, it certainly made divorce easier to do, and consequently diminished the sense of permanence in the marriage relationship.

47. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA*, 310-11 (1985). Indeed, one of the key reasons that children in single-parent households are at a disadvantage is that they are overwhelmingly poorer than those who grow up in two-parent households. *Id.* at 323; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 *THE FUTURE OF CHILDREN* 75, 83 (2005) (“[M]any studies have shown that economic resources explain some of the differences in well-being between children with single parents and those with continuously married parents. Research showing that children do better at school and exhibit fewer behavioral problems when nonresident fathers pay child support likewise suggests the importance of income in facilitating children’s well-being in single-parent households.” (citations omitted)).

48. Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 *GEO. J. GENDER & L.* 723 (2004); Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 *STAN. J. C.R. & C.L.* 179, 179 (2015) (“Although 22 states retain criminal statutes, they are rarely enforced, and criminal conversation and alienation of affection have been abolished in the vast majority of jurisdictions.”).

49. Phyllis Coleman, *Who’s Been Sleeping in my Bed? You and Me, and the State Makes Three*, 24 *IND. L. REV.* 399, 400 (1991) (arguing that “the constitutional right of privacy, properly interpreted, sweeps broadly enough . . .” to bar adultery prosecutions. “In this extremely sensitive arena of sexual activity between consenting adults, criminal laws are both inappropriate and ineffective attempts to shape public morals.”).

*C. Legal Recognition for Prenuptial Agreements*

Legal recognition and enforcement of prenuptial agreements reinforced this trend. The “pre-nup” was an overt acknowledgement of the impermanence of the marriage relationship, and the legal system reinforced that conception of marriage as a temporary relationship when it recognized the legitimacy of such agreements.<sup>50</sup> Now those considering marriage are already negotiating for what happens when the marriage ends. This agreement with the end in sight undermines the idea of marriage as a permanent institution. No longer is it “until death do us part,” but, “this is how we will divide the assets when the marriage ends.”

*D. Availability of Legal Benefits of Marriage Without Ever Getting Married*

At the same time, the legal landscape began to shift, which provided the benefits of marriage without the need to get married at all. *Marvin v. Marvin*, decided by the California Supreme Court in 1976, was a revolutionary blow to marriage as a legal institution, as it afforded the benefits of spousal support to someone who had never been a spouse. In fact, cohabitation is not a legal construct at all—the court was assigning legal consequences to a mere factual scenario, not to a legal status.<sup>51</sup> All the less reason to take on the commitments associated with marriage (and the stability that comes with it) if the couple can enjoy some of the benefits of marriage without the corresponding investment.

Finally, the states have developed alternatives to marriage, what one commentator has dubbed “marriage-lite,”<sup>52</sup> where at least some of the benefits of marriage are shared with couples who have not gotten married, either because they couldn’t (in the case of same-sex couples in many states) or because they simply chose not to make that

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50. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 890 (1997).

51. Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 488 (2007).

52. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 197 n.322, 198–99 (2005) (crediting Thomas Oldham for coining the term “marriage-lite”); J. Thomas Oldham, *Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitation Or, Can’t Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1430 (2001).

level of commitment. The nature and significance of these alternatives are discussed below.<sup>53</sup>

### *E. Decline of Marriage in Terms of Participation*

The decline of the legal status of marriage has been accompanied by a dramatic decline in participation. People in the United States are getting married later, and at far lower rates overall, than in the past.<sup>54</sup> Even those choosing to bear children are voting with their feet against marital vows, as the rate of out-of-wedlock births has risen dramatically.<sup>55</sup> Whether the decline in marriage participation is a product of the erosion of the legal significance of marriage, or vice versa, is of little importance. The decline in marriage rates has correlated strongly with the decline in the legal significance of marriage;<sup>56</sup> both developments suggest that marriage is a concept on its way out.

## IV. ALTERNATIVES TO MARRIAGE—BLURRING THE BRIGHT LINE

Over the past 15 to 20 years, states have passed laws creating alternatives to marriage, including civil union laws, domestic partner laws, and designated beneficiary laws, all of which have afforded rights to unmarried couples that had been previously reserved to those willing to commit to a traditional marriage.<sup>57</sup> Accordingly, marriage is no longer the legal bright line it once was. Most of these laws appeared to grow out of a desire to accommodate the needs and desires of same-sex couples for equal treatment, when the option of marriage was not available to them.<sup>58</sup>

Accordingly, the legislative recognition of alternatives to mar-

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53. See *infra* Section IV.

54. Lois M. Collins, *U.S. Marriage Rate Hits New Low and May Continue to Decline*, DESERET NEWS NATIONAL (May 20, 2015), <http://national.deseretnews.com/article/4535/us-marriage-rate-hits-new-low-and-may-continue-to-decline.html>.

55. Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), <http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html>.

56. See, e.g., Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 Harv. L. Rev. 1708, 1711 (1977) (“The decision in *Marvin* openly responds to the change in societal attitudes toward unmarried cohabitation.”).

57. See generally Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

58. *Id.* at 114.

riage appears entirely unrelated to the states' purported policy interest in promoting marriage—*i.e.* the need to promote stability in the affected relationships (for the benefit of children, society, etc.). Defenders of traditional marriage may have felt they had little choice but to acquiesce to these developments, as their efforts to stave off recognition of same-sex marriage would require *some* concession to accommodate the basic rights and interests of same-sex couples.<sup>59</sup> But this approach failed on all counts: the legal challenges to the marriage laws came regardless, and were successful in most cases. At the same time, the creation of these alternatives diluted and eroded the demand for, and arguably the respect for, marriage itself.

Domestic partnership laws gained acceptance in California after years of struggle to have same-sex couples be legally recognized as committed couples.<sup>60</sup> Civil unions were first created in Vermont in response to the Vermont Supreme Court case *Baker v. State*, where the court held that, according to the Vermont Constitution, same-sex couples had the constitutional right to equal benefits granted to opposite-sex couples.<sup>61</sup> The Vermont legislature responded by creating civil unions which gave similar benefits to same-sex couples as those enjoyed by married couples, applying the same laws for divorce, annulment, child custody and support, property division, and maintenance.<sup>62</sup>

While these alternatives were originally reserved for those who could not marry, in many states and cities, they have not been kept to the exclusive enjoyment of same-sex couples.<sup>63</sup> The upshot has been the further erosion of marriage's legal significance, as couples have other options, indeed attractive options, which provide many if not

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59. The naming of the Washington bill, the "Everything but Marriage" Act, reflects this compromise. Rachel La Corte, *Legislature Passes 'Everything But Marriage' Bill*, KOMO NEWS (Apr. 14, 2009), <http://komonews.com/news/local/legislature-passes-everything-but-marriage-bill>. Conservatives managed to keep marriage exclusively for opposite-sex couples but only by allowing everything else—a complete set of equivalent rights—to same-sex couples under another name.

60. NeJaime, *supra* note 57, at 114.

61. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

62. 15 VT. STAT. ANN. tit. 15, § 1204 (2015).

63. *Legal Information and Resources by State*, UNMARRIED EQUALITY, <http://www.unmarried.org/legal-information-resources-by-state/> (last visited Jan. 18, 2016) (Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Washington, Wisconsin, and cities therein, have provisions that allow opposite-sex couples to enter into marriage alternatives, though some are restricted to having one partner over the age of sixty-two).



all of the same benefits without the same level of commitment.

The State of Colorado's designated beneficiary law is a particularly strong example, as it does not even require mutuality. One partner can designate the other as "beneficiary" of an array of benefits, choosing them *à la carte*, quite regardless of whether the partner makes a reciprocal designation.<sup>64</sup> Further, one partner may unilaterally sever the designated beneficiary status of the other without the signature or even the knowledge of the other.<sup>65</sup> This regime affords benefits—historically available only to married persons—to persons who have failed to obtain any commitment at all from their designated beneficiary.

#### *A. Alternatives to Marriage Weaken Marriage in Terms of Participation*

The proliferation of alternatives to marriage has been, to a large degree, an effort to be fair to same-sex couples *without* affording them access to marriage itself. The State of Washington, for example, passed the "Everything but Marriage" Act in 2009, granting rights to same-sex couples that were equivalent to those afforded married couples, but refusing to call it marriage.<sup>66</sup> Polls in Washington at the time demonstrated that support for same-sex marriage was 37% in the state, but "another 29% said same-sex couples should have the same legal rights as heterosexuals—adding up to a 66% majority."<sup>67</sup> If alternatives to marriage exist that grant same-sex couples the same benefits as marriage, the state can meet its obligation to be fair to same-sex couples without expanding the definition of "marriage."<sup>68</sup>

But as any student of basic economics knows, creating substitutes or competing products can only decrease demand for the original good. The creation of alternatives has, therefore, decreased the attractiveness and hence the demand for traditional marriage. The ef-

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64. Colo. Rev. Stat. § 15-22-105 (2015).

65. Colo. Rev. Stat. § 15-22-111 (2015).

66. La Corte, *supra* note 59.

67. Kim Murphy, *Drive to Stop Gay Partnership Law is Dividing Conservatives*, L.A. TIMES (June 8, 2009), <http://www.latimes.com/nation/la-na-gay-rights8-2009jun08-story.html>.

68. Vermont could have extended marriage rights to same-sex couples in order to comply with the ruling of its Supreme Court. It chose, instead, to create the parallel concept of "civil union" to afford the same legal rights without calling it "marriage." See discussion *supra* accompanying notes 61–62.

fort to preserve it, by shunting same-sex couples off on alternatives—has served only to undermine it. If alternatives exist—appealing alternatives, which require less commitment—fewer and fewer couples will see the need, or even a reason, to opt for full-blown marriage.<sup>69</sup>

*B. The Alternatives to Marriage Have Undermined Marriage's Legitimate Secular Purpose*

If the purpose of legal recognition of marriage is to promote permanence and stability in relationships—as argued by defendants in the same-sex marriage cases—affording benefits to married couples as an incentive for them to form more stable and permanent unions, the proliferation of these alternatives to marriage has undermined that purpose. Because the alternatives offer some or all of the benefits of marriage, without requiring the level of commitment that marriage demands of its celebrants, these alternatives *a priori* do a poorer job of serving that public interest.

Domestic partnerships are far easier to enter into than marriage, and far easier to exit. Some states only require that the couple live together for a significant period of time in the same location. This simply transforms cohabitation, by default, into a domestic partnership that recognizes many of the same legal benefits as a marriage and provides for similar rights and entitlements upon dissolution.<sup>70</sup>

## V. THE IMPACT OF *OBERGEFELL*

*A. Justice Kennedy's Recognition of the Cultural Significance of Marriage*

The *Obergefell* decision—more accurately, the opinion of Justice Kennedy—was remarkable, not so much in its outcome, but in its motivation and tone. Justice Kennedy did not rely on an equal protection analysis, as other courts had done,<sup>71</sup> which would have involved identifying sexual orientation as a “suspect class” worthy of

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69. We have seen this development in some European countries. See discussion *infra* accompanying notes 94–98.

70. See generally Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189 (2001).

71. E.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

protection either at the strict scrutiny<sup>72</sup> level (like race) or the intermediate scrutiny<sup>73</sup> level (like gender).<sup>74</sup> Instead, the Court found that the right to marry whoever one wishes, regardless of their gender, is worthy of Fourteenth Amendment protection as a fundamental right.<sup>75</sup> To reach this conclusion, Justice Kennedy emphasized the issue of dignity, and how marriage is meaningful in society, and meaningful to the couple personally, in terms of their commitment to each other and in the recognition that the rest of society would give them.<sup>76</sup>

It is a startling thing, to see the cultural and personal significance of marriage cited and heralded by the Court. While religious conservatives may decry the Court's decision as yet another attack on an already embattled institution, while they may view it as another step toward the obsolescence of marriage, the opinion comes across as a surprisingly powerful endorsement of marriage. Indeed, Justice Kennedy's opinion suggests that marriage is a fundamental right precisely *because* of its unique and powerful cultural cachet, that the Court was compelled to its conclusion upholding the right to same-sex marriage only because marriage is so meaningful.

The opinion acknowledges the instrumental value marriage may have, encouraging stability of relationships, and benefitting children by giving incentives for parents to commit and stay together, relieving them of "the significant material costs of being raised by unmarried parents."<sup>77</sup> The opinion was rooted in the dignity of the individuals involved, however, and sought to spare children the "harm and humiliat[ion]" they would endure under the "the stigma of knowing their families are somehow lesser."<sup>78</sup>

If marriage is obsolete or fast becoming obsolete, any stigma associated with having unmarried parents would be negligible. If the harm and humiliation that comes with having unmarried parents rises to the level of a constitutional violation of one's fundamental rights, marriage must be very important indeed. All nine of the justices appear to share a view that marriage is important, the majority because

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72. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

73. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

74. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

75. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

76. *Id.*

77. *Id.* at 2600–01.

78. *Id.*

they signed onto Justice Kennedy's opinion, the other four expressing, in varying terms, the view that marriage is too important a social construct to be so quickly and easily redefined by a vote of only five individuals.<sup>79</sup>

So maybe marriage is not on its last legs, a mere vestige of an earlier day. Maybe there is vitality in the institution. After all, same-sex couples were not content to claim the benefits of civil unions; they sued for the right of access to marriage itself on the ground that it is important and meaningful, and the Supreme Court granted it precisely because it is so important and meaningful.

### *B. The Future of Marriage and of Its Alternatives*

Accordingly, the *Obergefell* decision may signal the start of the backswing of the pendulum, and marriage can reclaim the significance it once had and that Justice Kennedy insists it still carries. Now that marriage is available to everyone, there may be little continuing reason to recognize domestic partnerships, or other, lesser alternatives to the marriage contract.

Some states have already responded to the legalization of same-sex marriage this way.<sup>80</sup> The Connecticut state legislature, after legalizing same-sex marriage in 2008, eliminated civil unions and transmuted all civil unions into marriages.<sup>81</sup> Vermont followed suit in 2009, ceasing to perform civil unions after same-sex marriage was legalized.<sup>82</sup> Similarly, in 2011, New Hampshire converted all civil unions into marriages, and no longer allowed for civil unions.<sup>83</sup>

A similar approach has been proposed by the Internal Revenue Service, which in October 2015, proposed that because of the *Oberge-*

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79. *Id.* at 2612 (Roberts, C.J., dissenting) (“[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”). *Id.* at 2642 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013)) (Alito, J., dissenting) (“The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects.”).

80. David D. Meyer, *Supplement: Article: Section II.A. Civil Law: Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 130–31 (2010).

81. See 2009 Conn. Acts 09-13 (Reg. Sess.) (repealing civil union statute effective Oct. 1, 2010).

82. *Legal Information and Resources by State*, *supra* note 63.

83. See N.H. REV. STAT. ANN. § 457:46 (2015).

*fell* decision “the IRS will not treat civil unions, registered domestic partnerships, or other similar relationships as marriages for federal tax purposes.”<sup>84</sup> The proposal is out for comment now, and is getting some pushback. The American Bar Association has submitted comments resisting the change and is arguing that:

[R]ecognizing these alternative relationship statuses for federal tax purposes would better fulfill the Service’s professed purposes in issuing the Proposed Regulations, would result in fairer treatment of similarly situated taxpayers, would render tax considerations neutral in choosing between the different relationship statuses, and would better accord with the reality that several states already treat these relationships as marriages for purposes of their laws.<sup>85</sup>

Of course, if the purpose of legally recognizing marriage is to encourage stable, long-term commitments, it would be counter-productive to “render tax considerations neutral in choosing between the different relationship statuses.”<sup>86</sup> The ABA position is counter to the articulated policy rationales behind state recognition of marriage.

At the same time, some employers and insurance companies are refusing to extend benefits to unmarried partners, now that *Obergefell* has opened the door to marriage for everyone.<sup>87</sup> This trend began a few years ago as same-sex marriage was being legalized state-by-state. As the *New York Times* reported in 2011,

Now that same-sex marriage has been legalized in New York, at least a few large companies are requiring their employees to tie the knot if they want their partners to qualify for health insurance.

Corning, I.B.M. and Raytheon all provide domestic partner benefits to employees with same-sex partners in states where they cannot marry. But now that they can legally wed in New York, five other states and the District of Columbia, they will be required to do so if

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84. Definition of Terms Relating to Marital Status, 80 Fed. Reg. 64,378, 64,379 (proposed Oct. 23, 2015) (to be codified at 26 C.F.R. pts. 1, 20, 25, 26, 31, & 301), [https:// www.gpo.gov/fdsys/pkg/FR-2015-10-23/html/2015-26890.htm](https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/html/2015-26890.htm).

85. Anthony C. Infanti et al., *Comments on Proposed Regulations Regarding Definition of Terms Relating to Marital Status*, ABA Section of Taxation 12 (Dec. 3, 2015), <http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/120315comments.authcheckdam.pdf>.

86. *Id.*

87. One survey suggest that 30% of American companies now offering benefits to the same-sex domestic partners of their employees are “unlikely to continue providing [such] benefits . . .” after the *Obergefell* decision. Stephen Miller, *Poll: Many Will Now Drop Domestic Partner Benefits*, SOC’Y FOR HUM. RESOURCE MGT. (revised Aug. 20, 2015), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits-poll.aspx>.

they want their partner to be covered for a routine checkup or a root canal.<sup>88</sup>

If the states and federal agencies respond this way, rescinding benefits for couples who stop short of marriage, a reinvigorated priority to promote stability in relationships may give marriage a new lease on life. Legislators and judges will have less cause to seek, find, or recognize alternatives to the time-honored—and now expanded—institution that has always symbolized permanence of commitment between two individuals bound together to form a family.

## VI. CONTRASTING VISIONS OF POLICY BEHIND LEGAL RECOGNITION OF MARRIAGE

Of course, this discussion takes the state attorneys general at their word. That is, it assumes the reason the state recognizes marriage is to encourage permanence and stability in relationships, primarily for the benefit of children. But not everyone shares that vision. Some view marriage as an old-fashioned and unduly confining construct.<sup>89</sup> They celebrate the creation of alternatives to marriage, which give couples more freedom to define their relationship as they see fit, without sacrificing the benefits the law traditionally reserved for married couples.

If the purpose of marriage laws is to dole out benefits to couples who choose to conjoin their lives at some point and for some period, then this alternative vision makes sense. This is presumably the thinking behind the Colorado model, allowing for an *à la carte* approach to the legal benefits of marriage.<sup>90</sup> This is also undoubtedly the view that prompted the ABA Section of Taxation to argue against the proposed IRS regulations.<sup>91</sup> Nancy Polikoff has argued that the better policy is one that “values all families,” whether or not they are solemnized by marriage, or even by other types of state recognition.<sup>92</sup> Her plea to “make marriage matter less” constitutes an outright rejection of the policies advanced by the state attorneys general in their

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88. Tara Siegel Bernard, *As Same-Sex Marriage Becomes Legal, Some Choices May Be Lost*, N.Y. TIMES (July 8, 2011), [http://www.nytimes.com/2011/07/09/business/some-companies-want-gays-to-wed-to-get-health-benefits.html?\\_r=0](http://www.nytimes.com/2011/07/09/business/some-companies-want-gays-to-wed-to-get-health-benefits.html?_r=0).

89. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 11 et seq. (2008).

90. See discussion, COLO. REV. STAT., *supra* notes 64–65.

91. The ABA thought that individuals should be unconstrained by “tax considerations” when “choosing between the different relationship statuses.” *Infanti*, *supra* note 85.

92. POLIKOFF, *supra* note 89, at 151.

legal defense of traditional marriage.<sup>93</sup>

Certainly this line of argument has emerged, and this perspective has gained traction over the years, both correlating with and, perhaps, explaining the steady decline of marriage discussed *supra*. That is, perhaps, one of most the surprising things about the *Obergefell* case, both in the decision to pursue the claim to marriage and in the opinion it generated: they were rooted in the idea that marriage *does* matter. The showdown one might have expected after fifty years of decline in marriage would be the case to determine whether marriage has any legal currency at all anymore. Instead, the case saw both sides arguing that it *does* have currency, and the Court resting its decision on just how current it is. Accordingly, *Obergefell* may be giving marriage its new lease on life.

But America is still at a crossroads, needing to determine which direction it will go with the *Obergefell* ruling. As argued above, there may be compelling reasons to repeal any legal recognition for domestic partnerships and other alternatives, in an effort to pursue the policy objective of encouraging stable relationships and security for children by encouraging the commitment that comes with marriage. On the other hand, the alternative policy vision may be to entrench the alternatives, and seek to expand them further.

This latter approach appears to be the one taken in a number of European countries. In France, both same and opposite-sex couples have the option of entering into civil solidarity pacts, called “PACS” which provide some, but not the entirety of marriage benefits and duties.<sup>94</sup> In 2009, ninety-five percent of these PACS involved different-sex couples.<sup>95</sup> The rise in popularity of these alternatives to marriage was more significant in opposite couples than in same-sex couples.<sup>96</sup> Of note, also, is that as the rates for couples entering PACS rose, the marriage rate declined in France.<sup>97</sup> Similarly, in the Netherlands, opposite-sex couples account for ninety-five percent of registered partnerships.<sup>98</sup>

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93. *Id.*

94. Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 270–72 (2012–13).

95. *Id.* at 271.

96. *Id.*

97. *Id.*

98. *Id.* However, the Netherlands has legally recognized same-sex marriage, resulting in a higher number of same-sex couples opting for marriage instead of partnerships. *Id.* at 272–73.

As discussed above, Colorado has implemented a policy of maximizing options for couples, with their “designated beneficiary” law.<sup>99</sup> Individuals there can decide unilaterally which benefits they want to confer on their respective partners, and because they can revoke the designation at any time, also unilaterally, they need not make any commitment at all.<sup>100</sup>

Along these lines, the states, post-*Obergefell*, may view their policy priority—consistent with Polikoff’s “making marriage matter less” agenda—as nothing more than extending the benefits historically reserved to married couples as broadly as possible. Under this approach, the alternatives to marriage that require less commitment and that are easier to withdraw from will become further entrenched in our legal tradition and societal values.

But if the existing alternatives are kept, they *must* also be broadened. Now that marriage has been expanded to include same-sex couples, it will become imperative to make the alternatives—created for and, in some states, limited to same-sex couples—available, on an equal basis, to opposite-sex couples as well.<sup>101</sup> Young (or old) people in love will then have a whole array of options available to them. They will be able choose the level of commitment that suits them, without any particular incentive from the state to choose marriage, or any of the options that require high levels of commitment. The existence and expansion of these low cost alternatives to marriage, for opposite-sex couples too, will presumably prompt even more couples to opt out of traditional marriage.

## VII. REFORM STRATEGIES POST-*OBERGEFELL*

This debate, over the future direction of the law of marriage and its alternatives, is one that, for the most part, is still waiting to happen. The vision for marriage in Europe or Colorado would retain domestic partnership and other options for couples to define their relationship status. It would continue the historical trend toward the obsolescence of marriage as a legal concept, treating it as nothing more than one of many options. Those who favor this policy should

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99. See discussion, COLO. REV. STAT., *supra* notes 64–65.

100. See discussion, COLO. REV. STAT., *supra* notes 64–65

101. The logic is pretty straightforward: If it is unconstitutional to restrict marriage to opposite-sex couples, then it must also be unconstitutional to restrict domestic partnership to same-sex couples.



be resisting the shutdown of such alternatives that has happened in a few states, in insurance and employee benefit policies, and in proposed Internal Revenue regulations.

But defenders of traditional marriage should be mobilizing to eliminate these other options, and *Obergefell* gives them the opening to do so. Curiously, advocates on this side of the issue appear to be overlooking the opportunity, and focusing their attention on how wrong the *Obergefell* decision is, lamenting their limited options to get it overturned.<sup>102</sup> The jeremiad sounds distressingly familiar, echoing the ongoing distress over *Roe v. Wade* that has assumed such a prominent place in the rhetoric of the religious right for the past forty-plus years. But if their true purpose is to protect and promote marriage, they should consider a different strategy, one aimed at undoing the relatively recent dilution of marriage with lower-commitment alternatives.

Domestic partnership laws and other forms of “marriage-lite,” however, have not inspired the type of opposition among religious conservatives that same-sex marriage has.<sup>103</sup> So advocates of traditional marriage may not take up the cause. Perhaps their disenchantment with the holding in *Obergefell* has blinded them to possibilities it creates. If they really care about strengthening the legal significance of marriage,<sup>104</sup> Justice Kennedy’s opinion has provided them with a rare opportunity. Its ringing endorsement of marriage as a meaningful institution, at the same time removing the primary reason for recognizing alternatives to marriage, sets the stage to reverse marriage’s decades of decline. The *Obergefell* decision may provide the foundation for marriage to make a comeback.

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102. The symposium at which this paper was presented was dominated by such presentations.

103. As already noted, surveys have shown that a large portion of people who opposed same-sex marriage supported the idea of alternatives that would afford gay couples similar rights. Murphy, *supra* note 67. In the State of Washington in 2009, 37% of those surveys supported same-sex marriage. Of the remaining 63% who did not support it, almost half, or 29%, supported giving gay couples the same rights as married couples. *Id.*

104. It is not entirely clear what the defenders of traditional marriage want most. This argument assumes that they want a society that respects the marriage institution, and that demands formal commitment in relationships. Their ideological opponents have attempted to brand them as bigots, however, and if their true motivation is bigotry, they are unlikely to want to embrace *Obergefell* at all.

## VIII. CONCLUSION

The future of marriage, post-*Obergefell*, depends on what our public policy objectives will be regarding recognition of couples and families. Justice Kennedy's opinion in the case provides great support to the concept that marriage is something to be encouraged, revered, and protected, and that families benefit from the security that marriage provides. The proliferation of alternatives to marriage—e.g. domestic partnerships and designated beneficiaries—has certainly contributed to the ongoing erosion of marriage as a meaningful legal institution, but because these options were created mostly to accommodate same-sex couples, who now have full access to marriage, they may be swept aside. Clarity in the law will benefit from a return to bright-line rules, where nothing less than marriage itself qualifies individuals to enjoy and claim (1) legal status as a couple, gay or straight, and (2) the benefits that come with such recognition. At the same time, this would better serve the state's stated interest in promoting the security and stability of family relationships. In this sense, the *Obergefell* decision may not signal traditional marriage's demise as much as its rebirth, in an incarnation that is at once more inclusive and more robust.